

FILED \*10 MAY 06 13:59 USDC-ORE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
EUGENE DIVISION

ROBERT MANN,

Petitioner,

Civil No. 09-1153-TC

v.

FINDINGS AND  
RECOMMENDATION

JOE DECAMP,

Respondent.

COFFIN, Magistrate Judge.

Petitioner is in the custody of the Oregon Department of Corrections pursuant to the Amended Judgment, dated August 7, 2008, from Linn County Circuit Court Case No. 06040912D, after a conviction for Assault in the Fourth Degree.<sup>1</sup> Following a jury trial, a prison term of 60 months was imposed. Petitioner is not challenging that conviction or sentence in this proceeding. Rather, petitioner challenges a 1994

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<sup>1</sup>Petitioner was also convicted of Stangulation and Menacing, but those sentences were suspended.

conviction from Linn County Circuit Court Case No. 94040705. Petition (#1) p. 2. The only unsatisfied portion of the 1994 sentence is the post-prison supervision. Exhibit 101.

Respondent moves to deny relief and dismiss this proceeding on the ground that petitioner did not obtain permission from the Ninth Circuit Court of Appeals before filing this second or successive petition as required by 28 U.S.C. § 2244(b)(3)(A), and this court is therefore without jurisdiction.

Petitioner filed a petition under 28 U.S.C. § 2254 challenging the 1994 convictions<sup>2</sup> in Robert Mann (aka Fernandez) v. Jean Hill, U.S. District Court for the District of Oregon, Case No. 03-12-MO, but relief was denied. Exhibits 102 - 104. Both the District Court and the Ninth Circuit Court of Appeals denied petitioner's request for a certificate of appealability, and the United States Supreme Court denied the petition for writ of certiorari. Exhibits 105 - 107.

28 U.S.C. § 2244(b)(3)(A) requires petitioners to obtain permission of the Court of Appeals before filing a second or successive petition in the District Court. If a petitioner does not obtain the required certificate of authorization to file a second or successive petition, the District Court has no jurisdiction to consider the petition. Cooper v. Calderon,

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<sup>2</sup>Petitioner was convicted of two counts of Sodomy in the Second Degree and one count each of Sexual Abuse in the First Degree and Sexual Penetration in the Second Degree, and sentenced to 134 months in prison plus a period of post-prison supervision. Petitioner was released to post-prison supervision in April 2004.

274 F.3d 1270 (9<sup>th</sup> Cir. 2001).

Petitioner has filed a 20 page memorandum accompanied by a 25 page affidavit in which he acknowledges the previous federal habeas petition in 03-12-MO. See, Memorandum of Law (#22), Affidavit p. 11. Petitioner argues many aspects of his various convictions and appeals but has not alleged or established that he has obtained the certificate required by 28 U.S.C. § 2244(b)(3)(A).

Petitioner has not obtained the required certificate of authorization to proceed with a second petition concerning the convictions at issue in this proceeding. Accordingly, petitioner's Petition (#2) should be denied without prejudice. This proceeding should be dismissed.


This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right

to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

### ***Certificate of Appealability***

*Should petitioner appeal, a certificate of appealability should be denied as petitioner has not made a substantial showing of the denial of a constitutional right. See, 28 U.S.C. § 2253(c)(2).*

DATED this 6 day of May, 2010.

  
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Thomas M. Coffin  
United States Magistrate Judge